

1951

Angus H. Bishop v. Duck Creek Irrigation Co. et al : Brief of Plaintiff and Respondent

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

ANGUS H. BISHOP,

Plaintiff and Respondent,
vs.

DUCK CREEK IRRIGATION COM-
PANY, a corporation (Appellant):
BENJAMIN DRAINAGE DIS-
TRICT, a corporation; KENNETH
DIXON: CARL LINDSTROM:
LEO STEELE: LAVON PAYNE;
RULON CREER and JOHN B.
JONES,

Defendants.

DUCK CREEK IRRIGATION COM-
PANY, a corporation,

*Cross-Complainant and
Counter Claimant,*

vs.

BENJAMIN DRAINAGE DIS-
TRICT, a corporation; KENNETH
DIXON, CARL LINDSTROM;
LEO STEELE; LAVON PAYNE;
RULON CREER; and JOHN B.
JONES, and ANGUS H. BISHOP,

Cross Defendants.

BRIEF OF PLAINTIFF AND RESPONDENT

(APPEALED FROM DISTRICT COURT OF UTAH COUNTY)

JOSEPH E. NELSON, Judge

OCT 1 1954

Clerk, Supreme Court, Utah

ELIAS HANSEN,

Attorney for Respondent.

CHRISTENSON & CHRISTENSON,

Attorneys for Appellant.

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IN THE SUPREME COURT
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STATE OF UTAH

ANGUS H. BISHOP,
Plaintiff and Respondent,

vs.

DUCK CREEK IRRIGATION COM-
PANY, a corporation (Appellant):
BENJAMIN DRAINAGE DIS-
TRICT, a corporation; KENNETH
DIXON: CARL LINDSTROM:
LEO STEELE: LAVON PAYNE;
RULON CREER and JOHN B.
JONES,

Defendants.

No. 7660

DUCK CREEK IRRIGATION COM-
PANY, a corporation,

*Cross-Complainant and
Counter Claimant,*

vs.

BENJAMIN DRAINAGE DIS-
TRICT, a corporation; KENNETH
DIXON, CARL LINDSTROM;
LEO STEELE; LAVON PAYNE;
RULON CREER; and JOHN B.
JONES, and ANGUS H. BISHOP,

Cross Defendants.

RESPONDENT'S BRIEF

ADDITIONAL STATEMENT OF CASE

While the Statement of the Case contained in appellants Brief contains an abstract of a substantial part of the evidence received at the trial, much of the material evidence favorable to the respondent is omitted and considerable of the evidence which is abstracted is so recited as to give it a meaning more favorable to the appellant than the evidence, when considered as a whole, is entitled to. For the respondent to abstract the entire testimony would probably tend to confuse rather than clarify the matters at issue. We believe the court will be better able to evaluate the evidence and determine the issues which divide the parties if the respondent confines this, his additional statement of the case, to those matters which have been omitted from appellant's statement of the case and the evidence which respondent believes appellant has misconstrued.

Appellant in his Brief under the heading Statement of Facts states its position, and as we understand it, contends:

1. That the decision of the Trial Court should not be given the weight usually accorded to such court because of the long delay which lapsed between the time the case was tried and the time it reached its decision.
2. That the evidence does not show that the plaintiff has established any right whatsoever to the waters

from Duck Creek because it is not shown that water was applied to the lands for which a water right is claimed prior to 1903.

3. That the respondent having been awarded the water which finds its way into Duck Creek below what is referred to in the evidence as the Duck Creek Dam, he should not be awarded any water which is diverted at the Duck Creek Dam and diverted through the ditches leading therefrom to the lands which he is under contract to purchase.

4. That the appellant has not shown that he has any right to any water right divertable at the Duck Creek Dam or any right to divert any water through the ditches leading from such dam to his land.

5. That the appellant has a right to a flow of between four and ten second feet of water through the ditches leading from each of the two dams that divert water from Duck Creek.

6. That it is impracticable to carry out the terms of the Decree entered by the court below.

In the course of our Additional Statement of the Case and argument, we shall attempt to direct the attention of the Court to the evidence which amply supports the Decree appealed from.

THE TRIAL COURT WAS SUPPLIED WITH A TRANSCRIPT OF THE EVIDENCE AND IT VIEWED THE PREMISES INVOLVED IN THE CONTROVERSY.

Appellant directs the attention of the court to the fact that the trial court had this case under advisement for more than four years after the trial was had and before a decision was reached. Respondent certainly is not going to argue that such a long delay is justifiable, but the respondent having been deprived of the water to which he was entitled during those years, he should not also be penalized because of the delay. When the trial court, over objections of the respondent and appellant, ordered that new parties be brought in, it became necessary to secure a transcript of the evidence received at the original trial as otherwise the new parties brought in were not advised of what the evidence consisted of and, of course, could not be bound thereby. The new parties who were brought in pursuant to the order of the court consented that the evidence received at the original trial might be received as to them if a transcript were furnished and they be given an opportunity to refute any of such evidence. Pursuant to such arrangement, a transcript was prepared (See Tr. Vol. III, page 830) and paid for by respondent and appellant and a copy thereof furnished to the court. Thus the trial court had available a complete record of the proceedings from which it could refresh its memory.

Moreover, in cases such as this where the trial court views the premises in controversy, the rule that proper

weight should be given to the fact that the trial court has a better opportunity to arrive at the truth than does the reviewing court is especially applicable. While the view of the premises is not in and of itself evidence, it serves to enable the court to understand and give proper weight to evidence as to any physical condition of the premises which are in dispute. To illustrate, there was some conflict in the evidence as to whether certain ditches on the property of the plaintiff were irrigation or drain ditches. If by a view of the premises it appeared that the ditches were on the high ridges running through the property of the plaintiff, such fact would be convincing proof that the same were for use in irrigation and not for drainage purposes. So also, if old ditches were so located that they would serve no useful purpose except as a means of irrigating plaintiff's land, such fact would add considerable weight and might well justify the trial court in making a finding that otherwise would not be justified by the cold record of the evidence. That the trial court viewed the premises is made to appear from the record. Tr. Vol. II, page 823.

THE EVIDENCE SHOWS WITHOUT CONFLICT THAT THE PREMISES OF THE PLAINTIFF WERE IRRIGATED WITH WATER DIVERTED FROM DUCK CREEK AT THE DUCK CREEK DAM AND COURSED THROUGH THE DITCHES LEADING TO HIS LAND LONG BEFORE 1903.

In the Statement of the Case and elsewhere in the Brief, appellant makes the statement that the land of

the plaintiff was not irrigated until 1906 and that therefore the plaintiff has completely failed to establish any right whatsoever to any of the water of Duck Creek.

It may be worthy to note that the law of 1903 is not as exacting as counsel seems to contend. Section 72 of Chapter 100 of the Act of 1903 expressly provides that the repeal of the former law shall not effect any valid water right and that any water right initiated under the provisions of the law theretofore existing may be perfected in the same manner and with like effect as if such law had not been repealed. Prior to 1903, one could appropriate water by merely going upon a stream and diverting the water therefrom and putting it to a beneficial use. If, however, one desired to have a right when perfected relate back to a fixed time to prevent intervening claimants from acquiring a prior right, it was the practice to give notice of intention to appropriate a specified amount of water. However, the giving of such notice was not necessary to a valid appropriation. An appropriation may be initiated by an intention to appropriate water for some useful purpose accompanied by some open physical demonstration of the intent. *Elliot v. Whitmore, et al.*, 23 Utah 342; 65 Pac. 70. *Patterson v. Ryan*, 37 Utah 410; 108 Pac. 1118. *Deseret v. Hoopland*, 66 Utah 251; 239 Pac. 479. *Jensen v. Birch Creek Ranch*, 76 Utah 356; 289 Pac. 1097. In this case, however, there is no necessity to resort to the

doctrine announced in the cases just cited to support the view that water was appropriated for the irrigation of a substantial part of plaintiff's land long before 1903.

Ray Stevens, who owned the land or a substantial part of the land, upon which plaintiff claims a water right, from 1906 to 1924, testified that he has been familiar with the lands for the last forty or fifty years, Tr. 6. That other than what he referred to as the North Extension Ditch, he has been acquainted with the ditches ever since he was ten years old. Tr. 14. That he was 60 years old in 1946 at the time he so testified. Tr. 15. That the ditches other than the north extension ditch were old ditches when he first became acquainted with them. Tr. 14-15. That during the time the old ditches were in existence, he has known water to be coursed through them to the lands below. Tr. 15. It will be noted that the ditches referred to in the testimony just mentioned, are ditches leading from the Duck Creek Dam; that the ditches leading to the land of plaintiff were there in 1906, but some of them have been straightened out. Tr. 22.

William Betts, a witness called by the plaintiff, testified that he was 72 years of age. That in March 1886 he worked for Orange Warner, who was then living on the A. J. Stewart ranch; that he worked for A. J. Stewart on his property from November 1, 1886 until November 1887. That A. J. Stewart owned the property down there and was operating the same. Tr. 178. That water was diverted from the Benjamin Slough or Bear Creek at what has been referred to as the Duck Creek Dam, Tr.

179. That the dam was made with poles and slabs and manure and the water diverted in a northwest direction for a distance and then straight west; that the water was coursed west of the Jackson Stewart home and then used to irrigate some oats and potatoes; that it runs west eight acres (rods) or better. Tr. 180. (The Stewart home was at or near the northeast corner of Section 31 and the northwest corner of Section 29. Tr. 358). That the ditch extended about eighty rods west of the Jackson Stewart barn and home. Tr. 181.

A. J. Stewart was called as a witness by the defendant and testified in part as follows: That he would be 83 years of age in September. Tr. 356. That he has been acquainted with the Benjamin Slough since he was 11 years old. Tr. 356. That in about 1880 or 1885 ditches were constructed to irrigate the land where there were meadows that had theretofore been flooded. Tr. 382. That A. J. Stewart, Sr. and A. J. Stewart, Jr. owned and operated their lands in common until after 1885; that they irrigated about 40 acres of land; that of the land irrigated, 10 acres was west of the highway. Tr. 374. That he had seen some of the ditches on the property in controversy just before the trial and they were at the same location as they were when he first went down in that territory. Tr. 158. That water to irrigate the land shown on the map, plaintiff's Exhibit A, was secured by commingling the water from the springs north of Payson and the water diverted out of Duck Creek at the Duck Creek Dam. Tr. 474-488-490. That

there was about 100 or 75 acres irrigated with water from those sources. (It will be noted that the land indicated by the blue and black on plaintiff's Exhibit A is a part of the land being purchased by the plaintiff for which he claims a water right.)

THE EVIDENCE SHOWS THAT THE WATER WHICH COMES FROM THE SPRINGS NORTH OF PAYSON IS NOT AVAILABLE FOR THE IRRIGATION OF THE EASTERLY PART OF PLAINTIFF'S LAND AND THEREFORE, IF RESPONDENT IS DEPRIVED FROM SECURING WATER DIVERTED AT THE DUCK CREEK DAM, THE EASTERLY PART OF HIS PROPERTY WILL BE RENDERED VALUELESS.

It is asserted in appellant's Statement of Facts and repeated in its argument that the water from the springs arising to the north of Payson which finds its way into Duck Creek between the Duck Creek Dam and the Stevens Dam is sufficient to supply respondent's needs. It is also repeatedly asserted that the water available from the springs north of Payson flows about two second feet.

Ray Stevens, one of plaintiff's witnesses, did estimate that about one and a half or two second feet of water finds its way into Duck Creek from springs arising north of Payson City. Tr. 87. However, actual measurements made by Elmer Jacob, a witness called by the defendant, show that on June 16, 1946, there was 1.13 cubic feet per second available at the Stevens Dam. Tr. 422. That was the total quantity of water that accumu-

lated in Duck Creek below the Duck Creek Dam and above the Stevens Dam. That measurement was made within a few days after there had been a heavy rain-storm so that the water at the Stevens Dam was in all probability above the normal amount. It is made to appear that on the preceding June 4th, there was an estimated ten second feet of water passing the Stevens Dam and that the flow had recently been much more, Tr. 297-298. No claim is or could successfully be made by the defendant company that it ever had any interest in or claim to the water which finds its way into Duck Creek below the Duck Creek Dam. That water cannot be delivered by gravity flow to the stockholders of the defendant company because the lands of the stockholders of the defendant company are higher in elevation than the water in Duck Creek below the Duck Creek Dam. Moreover, at the trial, counsel for the defendant company stated that the company made no claim to such water. Tr. 19.

Moreover, by the Decree appealed from, the parties are limited to four acre feet per annum on the lands involved in this controversy. If the water which finds its way into Duck Creek below the Duck Creek dam exceeds four acre feet for the land irrigated from that water, the plaintiff is not awarded any water above that amount. At this point we digress to observe that we find it extremely difficult to follow the argument of appellant that it should be awarded a flow of four cubic feet per second to supply the land of the stockholders of the

defendant company who divert water from the upper dam to irrigate the about 100 acres of land irrigated from that source, and at the same time contend that less than one-third of that amount, that is 1.13 second feet, is ample to irrigate an equal amount of land which is being irrigated by plaintiff with water diverted at the Stevens Dam. We shall presently have more to say about this unusual contention in connection with the evidence touching the amount of water awarded to the defendant company.

At this point, suffice it to say, the trial court awarded to the plaintiff only such water as defendant's witness, Elmer Jacob, testified was necessary to supply such land with a proper quantity of water. Mr. Jacob testified in part as follows: After having qualified to testify as an expert he stated: "Well, I think a reasonable duty there would be seventy acres to the second foot delivered at the land based upon the flow of water; that is the amount allowed by the State Engineer in his certificate * * *." "Well, I think seventy would be a reasonable duty, seventy acres to the second foot. It is a heavy clay ground and the surface would not be heavy and the land will hold water very well." Tr. 433. On cross examination, he stuck to his opinion that the duty of water on the land here involved is a second foot to seventy acres.

On cross-examination he was asked the following questions and gave the following answers:

- “Q. If the water is only available for a part of the year, would you need more than or less than one second foot to seventy acres of land where you only had water a part of the time.
- “A. It wouldn’t make any difference, if you have an excess of water and we have a drouth later on, I am trying to answer your question as I understand it,—and with your drouth after the first of July, if you pour water into prior to that time, the only thing that you can follow up is your ground water and when that is gone, the drouth will destroy the crops later on. Now the water that was available earlier than July first, that is water under the bridge. If you don’t get it after July first, your crop will die. It wouldn’t matter if you had a duty as lot (large) as ten acres to the second foot, if you don’t get any after that, you can’t raise a late crop.”
Tr. 437-438.

Mr. Jacob upon being recalled testified that the land here involved could get along with about four acre feet per acre per annum. Tr. 642. It will be noted that if we take Mr. Jacob’s measurement of the flow of Duck Creek below the Duck Creek Dam at 1.13 second feet and the area irrigated from the Stevens Dam at 100 acres, there would be less than one second foot of water available for 70 acres of land. It would seem that no useful purpose will be served by further argument on this phase of the case because the defendant may not be heard to complain about the award of the water arising in Duck Creek below the Duck Creek Dam because such water is not available to it and in effect it has disclaimed any

right to such water. There seems to be no issue of fact or of law with respect to that water. Even if there should be sufficient or more than sufficient water finding its way into Duck Creek below the Duck Creek Dam, such fact could not affect plaintiff's right to divert water from the Duck Creek Dam to irrigate land which must be irrigated with water diverted at the Duck Creek Dam.

THE EVIDENCE SHOWS THAT IN EXCESS OF 68 ACRES OF PLAINTIFF'S LAND WAS, AT THE TIME AND TIMES INVOLVED IN THIS CONTROVERSY, IRRIGATED FROM WATER DIVERTED FROM DUCK CREEK AT THE DUCK CREEK DAM.

It is asserted in appellant's Statement of Facts that the evidence shows that only thirty acres of grain has been irrigated by the predecessors in interest of the plaintiff with water diverted from Duck Creek at the Duck Creek Dam. Of course, no one claims that there was sufficient water available at all times, or for that matter at any time, during the summer season to irrigate all of the land that had at times been devoted to raising cultivated crops. There was not sufficient water for the land which was irrigated from the upper dam and which was, at the time of the incorporation of the defendant company, awarded two shares of water to each acre of land. See testimony of Mrs. Hickman. Tr. Vol. I, page 390-392. There is much other evidence to the same effect and it is so alleged in the pleadings of the parties and in the trial court's findings. R. 193, Finding 26.

If, as the evidence shows, there was not sufficient water to irrigate the land under the upper dam with two shares to the acre, it follows that less than one-half of the land which the court found had been devoted to the raising of cultivated crops with water diverted from the lower or Duck Creek dam could be irrigated in any season with one share of water allotted to it pursuant to the Articles of Incorporation of the defendant company. In other words, of the approximately 200 shares of water right in defendant company which was allotted to irrigate the approximately 100 acres of land irrigated from the water diverted from the upper dam, it follows that less than one-half of the 200 acres of land owned by the stockholders of the defendant company which the court found had been devoted to raising cultivated crops could have been irrigated in any given year with the slightly in excess of 200 shares that were, by the Articles of Incorporation of the defendant company, allotted to landowners who irrigated their land from water diverted at the lower or Duck Creek Dam.

We have heretofore indicated in this Brief that the defendant company cannot well be concerned with the water which finds its way into Duck Creek below the Duck Creek Dam and above the Stevens Dam. If, as defendant company contends, there is an average flow of two second feet available below the Duck Creek Dam for irrigation, the plaintiff under the Decree would have used all of the water to which he is entitled by the use of that water. Thus, Mr. Jacob, the defendant com-

pany's expert witness, testified and the court found that four acre feet per acre is the duty of water on the land here involved and that the irrigation season extends for a period of probably six months or about 184 days. Two second foot of water will flow approximately 736 acres of water in an irrigation season of six months which it will be noted is more water than was awarded to the plaintiff to irrigate the land which is irrigated from the Stevens Dam. R. 205. In any event, such water is not available to the defendant company, and as we have pointed out, the defendant company at the trial in effect disclaimed all right to such water.

The controversy thus resolves itself to the amount of land that the plaintiff should be awarded a water right to irrigate with water diverted out of Duck Creek at the Duck Creek Dam. The total area covered by the contract to purchase by the plaintiff consists of 387.75 acres. See plaintiff's Exhibit D 2.

Touching the amount of land irrigated by plaintiff's predecessor in interest, Edward Ray Stevens, out of water diverted at the Duck Creek Dam, he testified that one hundred acres was irrigated from the Stevens Dam. Tr. 21. That about one-half of the 47½ acre piece marked in green on the map was irrigated out of the Stewart Ditch which diverts water from the Duck Creek Dam; that he has watered that land every year since 1906; that all of the ditches on the lands in controversy were there in 1906, but some have been straightened out.

Tr. 22. That he has irrigated one-half of the 47½ acres shown on the map, plaintiff's Exhibit A, from water diverted from Duck Creek Dam ever since he acquired the property in 1906. That he has irrigated through the north ditch ever since he owned the property; that the two ditches were used to irrigate about 100 acres. Tr. 24; that about 175 acres of the portion marked in red has been irrigated out of the ditches leading from the Duck Creek Dam. Tr. 26. That out of the ditch that is used to irrigate one-half of the 47½ acres, is also used to irrigate about 40 acres marked in red. That is irrigated out of the ditch marked Old Stewart Ditch, but there is probably not quite 40 acres; that he irrigated about 20 acres out of the other Stewart Ditch. Tr. 28. After a Mr. Wilson testified, Mr. Stevens was recalled and in order to clear up his testimony, he further testified: That he irrigated out of the South Stewart Ditch 23 to 25 acres. Tr. 50. That he irrigates an additional 10 acres out of that ditch, and about one-half to two-thirds of another piece of about 50 acres or about 30 or 35 acres. Tr. 52. That he irrigated about 30 acres out of the second ditch. Tr. 54. That he irrigated approximately 80 acres out of the most northerly ditch. Tr. 54. Mr. Stevens further testified that during the time he owned the lands in controversy, he raised wheat, barley, oats and meadow hay. Tr. 63. That he usually planted thirty to forty acres in grain; that two years he had 80 acres in grain that were irrigated out of water diverted from the Duck Creek Dam. Tr. 64. That he irrigated meadow hay out of water diverted from Duck

Creek Dam. Tr. 65. That he irrigated about 80 acres of grain from the Stevens Dam. That at one time he had 70 acres of alfalfa that was irrigated out of the Stevens Dam. Tr. 72. That since the Benjamin drain was put in you can't raise grain without water. Tr. 67. Mr. Stevens further testified that he raised 150 to 200 tons of hay in the dry year of 1934. That when the water got down to two second feet, he did not attempt to use any water. Tr. 90. That after the drain was constructed, he got some of that water. Tr. 91.

During the direct examination of Edward R. Stevens an attempt was made to show that when the Duck Creek Irrigation Company was formed he was asked to join that company, but such evidence was rejected because Andrew Stewart who asked him to join was dead. Tr. 141. However, later on cross-examination the information was brought out. Tr. 156. Mr. Stevens further testified that no one questioned his right to the use of water diverted from the Duck Creek Dam until about 1942 or 1943. Tr. 58-59.

Howard Stevens, a son of Edward R. Stevens, who was the owner of part of the property for which the plaintiff had a contract of purchase and for which a water right was claimed, Tr. 206, testified in part as follows: That on numerous occasions he helped the Tucker boys, Ren Stewart, and Lavar Curtis clean out the ditch referred to in the evidence as the Stewart Ditch. That he also helped clean out the ditch marked

Stewart Ditch No. 2. Tr. 207-208. That he did work on the ditches every spring; that he was 34 years old at the time of the trial, Tr. 205, and he remembered those ditches as far back as he could remember; that is since he was six or eight years old. Tr. 209. That water was diverted through the ditches that he has mentioned during each and every year as far back as he can remember and that so far as he knew no one ever questioned the right of the witness and his father to use the ditches and the water that was used; that the water used through those ditches came from the Duck Creek Dam. Tr. 210. That there was 83 or 84 acres in one tract, about 50 acres in another tract and about 10 or 11 acres in another tract irrigated with water diverted at the Stevens Dam. Tr. 211. That about 23 or 24 acres of the land marked in green, and about ten acres of the land of the south part of that painted red, and ten acres of meadow was irrigated from the South ditch that diverts water from Duck Creek. That the lands that are irrigated with water diverted at the Duck Creek Dam cannot be irrigated with water diverted at the Stevens Dam. Tr. 212; that about 35 acres of land was irrigated from the next ditch to the north, that is the ditch marked Stewart Ditch No. 2 on the map, plaintiff's Exhibit A. Tr. 213. That about 90 acres was irrigated with water diverted through the most northerly ditch diverting water from the Duck Creek Dam. Tr. 214. That meadow hay, wheat, barley, oats and in later years alfalfa was raised on the land, and from 125 to 200 head of cattle were fed on the property. Tr. 217.

THE EVIDENCE SHOWS THAT PLAINTIFF'S PREDECESSORS HAVE USED THE DITCHES LEADING FROM THE DUCK CREEK DAM, UNDER CLAIMS OF RIGHT, TO CONVEY WATER TO PLAINTIFF'S LANDS FOR MORE THAN A HALF CENTURY AND THAT PLAINTIFF'S PREDECESSOR, A. H. RALEIGH, WAS ON DECEMBER 23, 1896 AWARDED SUCH RIGHT, TOGETHER WITH A RIGHT TO SOME OF THE WATERS OF DUCK CREEK OR BENJAMIN SLOUGH.

There was received in evidence the files in the case of *A. H. Raleigh v. A. J. Stewart, Jr. et al.*, Case No. 56. Tr. 817. It will be seen from the Decree entered in that case that A. H. Raleigh was awarded all of the waters of certain designated springs up to July first. It further appears from the findings that "the plaintiff and defendants are each entitled to some water from what is known and described in the pleadings as The Slough or Slough Springs, but is not able to find from the testimony submitted the amount each or any of the parties are entitled to." It will further be noted that the 100 acres of land upon which such water was to be used for irrigation consists of the southeasterly part of the land to which plaintiff claims a water right.

An examination of plaintiff's Exhibit A and defendants' Exhibit 2 shows the location of the ditches leading from the Duck Creek Dam at the time of the trial. It will be seen from both of the maps that all of the branches of the ditch that lead from the lower dam extend to the lands of the plaintiff. In light of the fact that the territory involved in this controversy slopes towards the

northwest, it is very significant that these ditches are all constructed to the lands of the plaintiff. Of course if these ditches were of recent construction there might be some merit to defendants' contention that plaintiff has not established a right to the use of the same, but such is not this record. Mr. Edward R. Stevens testified that the ditches have been where they were at the time of the trial as long as he can remember or since he was ten years old, except for some slight changes. (He was 60 years old at the time of the trial and he purchased part of the property now being purchased by the plaintiff in 1906). The ditches were old ditches when he first became acquainted with them. That Andrew Stewart Sr. was the principal owner of the land over which the ditches ran when he first became acquainted with that territory. Tr. 14.

We have heretofore directed the attention of the court to the testimony of William Betts in which he testified that a ditch extended westward to the lands of plaintiff as early as 1886. Tr. 180. Howard Stevens testified that he helped clean out the ditches about every year; that no one ever questioned the right of he and his father to use the ditches so far as he knew. Tr. 210.

Edward R. Stevens testified that he did not help out in the cement dam which is referred to in the evidence as the Duck Creek Dam, but he did help fix it up. Tr. 11. That no one questioned his right to use the ditches until 1940. Tr. 63. That he helped put in some

concrete head gates in the ditches leading from the Duck Creek Dam, and a wooden culvert, and a wooden head gate. Tr. 111. That about 1922 he and Ren Stewart put in a culvert and a wooden headgate a little west of the Duck Creek Dam; that a little west and north of the Duck Creek Dam, he helped put in three cement dams. Tr. 128. That he furnished some of the flash boards for the Duck Creek Dam which at times he removed to let the water down to the Stevens Dam; that on several occasions he worked on the ditches, Tr. 132. That he and Ren Stewart worked on the ditch that runs north; that they were using a ditcher and the team ran away and Ren Stewart was injured. Tr. 133.

In the course of our argument, we may find occasion to refer to other evidence, but the foregoing statement will serve to direct the attention of the court to plaintiff's theory of what the facts are, as disclosed by the evidence.

BY THE DECREE APPEALED FROM THE DEFENDANT, DUCK CREEK IRRIGATION COMPANY, WAS AWARDED MORE THAN A SUFFICIENT PRIMARY WATER RIGHT TO SUPPLY THE LANDS OF ITS STOCKHOLDERS UNDER THE UPPER DAM.

Throughout its Brief the appellant contends that the water users under the Upper Dam have a water right to irrigate their lands which is superior to any right of the plaintiff and that during the trial plaintiff conceded that to be so. We again concede that to be so.

However, the Court in its decree awarded to the defendant a prior right to two second feet which is more than sufficient to satisfy the prior rights of the stockholders who divert their water from the Upper Dam. We again direct the attention of the Court to the testimony of defendants' witness, Elmer A. Jacob. He testified that the duty of water on the lands here involved was one second foot to 70 acres of land. Tr. 433. Counsel for the plaintiff on cross-examination attempted to get Mr. Jacob to admit that it would require more than one second foot of water for 70 acres if there was not a constant stream. However, Mr. Jacob insisted that more than a second foot to 70 acres of land could not be beneficially used on the land of the parties to this litigation. Tr. 437.

The evidence further shows that about 100 acres and not to exceed 150 acres of land is and has been irrigated with water diverted from the Upper Dam. See testimony of O. R. Stewart. Tr. 627. The fact that about 150 acres of land was irrigated out of the Upper Dam is further supported by the fact that about 200 shares of stock in the Duck Creek Irrigation Company was issued to the water users under the Upper Dam and two shares were issued to each acre of land that was being irrigated. Tr. 397 and 628.

In addition to the court awarding the defendant a prior right to 2 cubic feet per second, the Decree awards the defendant company and its stockholders 400/568 of the flow of Duck Creek so long as the total

flow does not exceed a total flow of 28 cubic feet. Thus, the water users who divert water from the Upper Dam are permitted to participate in additional water that may be available for use even though the defendant company and its stockholders are fully supplied with a flow of two second feet.

The court having awarded to the defendant company and its stockholders who divert water from the upper dam all and more water than the evidence of their expert witness, Jacob, testified was sufficient, the appellant has no cause to complain.

It is argued in appellant's brief that the water which finds its way into Duck Creek below the Duck Creek Dam is sufficient to supply the needs of the 100 acres of land that the court found is and has been irrigated with water diverted from the Stevens Dam. The evidence shows that when Jacob made this measurement on June 16 there was only 1.13 second feet of water available at the Stevens Dam. If 1.13 second feet of water is sufficient to supply plaintiff's land which is irrigated from the Stevens Dam, surely the two second feet of primary right awarded to the defendant is much more than sufficient to irrigate the approximately 100 acres of land that is irrigated with water diverted from the Upper Dam. In one breath it is argued that the 1.13 cubic feet of water is sufficient to irrigate 100 acres of plaintiff's land and in the next breath it is argued that about four times that quantity of water is necessary to

irrigate an equal amount of the land of the stockholders of the defendant company and such claim is made notwithstanding the lands join.

It is somewhat difficult to follow the argument of counsel for the defendant company touching the water that finds its way into Duck Creek below the Duck Creek Dam. As we understood defendants' position at the trial they did not claim and never had claimed any right to the water that finds its way into Duck Creek below Duck Creek Dam. It was so stated by counsel for the defendant at the trial. Tr. 19. There is thus no issue as to the water which finds its way into Duck Creek below the Duck Creek Dam. So also there is no issue as to the priority of the water beneficially used by the stockholders who divert water from the upper dam. More than the quantity of water to which such stockholders are entitled has, as heretofore pointed out, been awarded to the defendant company.

In our view, this controversy in so far as it effects defendants' appeal resolves itself into the following:

1. After the defendant has been supplied with a flow of two second feet of water does the evidence support an award to the plaintiff of a right to 168/568 of the flow of the Benjamin Slough during the period extending from March 1st to December 1st of each year and to 68/368 of such water from May 1st to August 15th of each year so long as the water does not exceed twenty-eight cubic feet per second.

2. Does the plaintiff have a right to use the ditches which divert water from the Duck Creek to his lands to carry the water to his land.

If the plaintiff has the right to the use of the water above indicated, we do not anticipate it will be contended that if he chooses he may permit the water which may be diverted at the Duck Creek Dam to flow past that dam and be diverted at the Stevens Dam. Obviously the defendant company and its stockholders cannot be injured by such procedure, and if and when the flow of water into Duck Creek below the Duck Creek Dam falls to as low as about one second foot, such a small quantity of water would be of little or no value in use for irrigation.

We have heretofore, in this brief, directed the attention of the court to plaintiff's evidence touching the use of water which his predecessors diverted from the Duck Creek Dam and the work he did towards maintaining that dam and the ditches leading therefrom. We shall not repeat such testimony. Counsel for the defendant company has directed the attention of the court to certain testimony of the witness, Edward R. Stevens.

The evidence supports the finding of the trial court to the effect that during low water seasons the water available from Duck Creek was devoted to raising cultivated crops. No complaint is made of such finding. Apparently counsel for defendant company would have

the court believe that the stockholders of the defendant company irrigated 300 acres of land devoted to the raising of cultivated crops each year. Such a contention is wholly without support in the evidence. On the contrary, the evidence is all to the effect that even the land that was irrigated with water diverted from the Upper Dam and which had two shares of water for one acre of land was always short of water during the low water season. See testimony of Mrs. Hickman, Tr. 390, testimony of George W. Tucker, Tr. 549 and testimony of O. R. Stewart, Tr. 672.

Counsel for the defendant company is in error when he says that Edward R. Stevens never raised more than 30 acres of cultivated crops. On page 64 of the transcript, Mr. Edward R. Stevens testified that he usually plants 10 acres into oats, and as a rule about thirty or forty acres into grain, and he put about 80 acres into grain two years. It is, to say the least, doubtful if under the evidence in this case a finding to the effect that the stockholders of the defendant company who diverted water from the Duck Creek Dam irrigated as much as 100 acres of cultivated crops in any given year with water so diverted, yet it will be noted that the defendant company was awarded a water right during the period extending from May 1st to August 15th on the basis of the stockholders of the defendant company who divert water at the Duck Creek Dam devoting 200 acres to the raising of cultivated crops. The award was on a total area of 300 acres being devoted to cultivated crops and

of that acreage 100 acres were irrigated with water diverted at the Upper Dam. We again direct the attention of the court to the fact that in addition to the proportion of the water awarded to the defendant company, it was also awarded two second feet whenever the water fell to or below that amount.

In connection with the distinction made by the trial court in its award of water for cultivated and non-cultivated crops, we digress to observe that so far as we are advised the use of water to produce hay and grasses to feed 125 to 200 head of cattle is as much a beneficial use as it is to use water to produce other crops. Indeed with the present price of beef it would be fortunate if more lands were devoted to the raising of livestock. If, however, the defendant company should have its way and make the owner of plaintiff's property dependent upon the consent of defendant to the use of the waters of Duck Creek and the ditches leading from Duck Creek, which plaintiff's predecessors have used for more than half a century, then and in such case plaintiff's lands would be rendered valueless. If the actions of the officers of the defendant company denying to plaintiff his right to course water to his lands is any criterion as to what to expect in the future, the officers of the defendant company are bent on compelling the plaintiff, and those who might acquire the property which he is purchasing, to rely solely on their will as to whether plaintiff and his successors may or may not continue in the business of

raising cattle on the property being purchased by the plaintiff. In this semi-arid west, hay and grasses will not grow without water.

It appears from the evidence that Stevens has raised as much as 200 tons of hay in one season in addition to grain on property which plaintiff is purchasing and has maintained from 125 to 200 head of cattle thereon.

It is repeatedly stated in appellants' brief that plaintiff's predecessor in interest sought and secured the consent of the defendant to use the ditches and water which was used. Counsel for appellant is in error in making such statement. So far as the evidence shows neither the plaintiff nor his predecessors in interest ever sought or secured the consent of the defendant company to use either the ditches or the water which was used. Plaintiff did, just prior to the commencement of this action, demand from the defendant company that it permit him to use some water and the ditches, which demand was refused except on condition that he make a token payment to the defendant company for use of the ditches and that the defendant company had water that it would sell to the plaintiff. Tr. 324 to 326. There is evidence that on one or two occasions Mr. Stevens asked the one who was using the water for the same. Such fact may tend to show that Mr. Stevens was behaving like a good neighbor should by not taking the water until his neighbor had finished irrigating his land, but surely Mr. Stevens was not required to engage in any

encounter with his neighbor in order to maintain his water right. In this connection, it should also be observed that so far as the evidence shows, neither the defendant nor its stockholders took the water away from plaintiff's predecessors when they were in the process of irrigating their crops.

Moreover, it is an elementary principle of law in this jurisdiction that one cannot acquire a right to the public waters of this state by the mere use thereof. The use must be beneficial. U.C.A. 1943, 100-1-3 and cases cited in the foot note. It would be enlightening to learn how the defendant company acquired a right to the waters of Duck Creek so that it had water to sell to the plaintiff. So also would it be enlightening to be informed as to why it was necessary for the plaintiff to secure the consent of the defendant company to use the water of Duck Creek that was not being used or could not be beneficially used by the defendant or its stockholders.

It is also repeatedly asserted that the predecessors of the plaintiff did not assert a right to the use of water during low water seasons. Edward R. Stevens did so testify. During the late season there was rarely sufficient water available to be of any use to irrigate plaintiff's land. It would have been an idle gesture for the owner of the property being purchased by the plaintiff to have demanded water when the water available could not have reached such property in sufficient quantity to be

of any benefit. If defendants' witnesses are to be believed that was the condition that prevailed every year after the middle of June or the first of July. Tr. 377-406-672.

Indeed on June 16 during the trial when Elmer Jacob made his investigation of the flow of Duck Creek, which was within a few days after a heavy rain, there was only 1.93 second feet being diverted at the Upper Dam. Tr. 439. On that day there was 2.01 diverted at the lower dam and the total flow of Duck Creek on that day was 2.77 second feet. Tr. 440. It will be remembered that the defendant company is by the decree awarded a prior right to two second feet.

There is no way of determining just what the various witnesses meant when they referred to low water, but as we have heretofore pointed out, the evidence shows that when the flow of Duck Creek got so low that it was of little or no value to those who diverted water from the Lower Duck Creek Dam and particularly to those at the end of the ditches leading from that dam, the upper land owners used the water because they were the only ones who could get it onto their lands to do any good.

The evidence also shows that prior to about May 1st to May 15th, depending on the season, there is no demand for water to irrigate agricultural crops. Tr. 589. The trial court in its findings took the earlier date of May 1st when irrigation begins.

It is a matter of common knowledge that in operating a farm, the crops planted thereon vary from year to year, and as different crops are planted the time that water can be applied varies. Thus as the evidence shows, grasses and wild hay and probably alfalfa can be beneficially irrigated as early as March or April. If perchance land devoted to the raising of grain should be devoted to a pasture for dairy cows, it would be little short of a calamity if water could not be used to irrigate such land until May 1st or 15th because it had theretofore been used for raising grain which had not been irrigated before May. If a tract of land has a water right, common sense dictates that water should be applied when the crop growing thereon needs irrigation.

THE EVIDENCE FAILS TO SHOW THAT DEFENDANT COMPANY IS ENTITLED TO ANY MORE WATER THAN WAS AWARDED TO IT.

Under its second point, defendant asserts that it should be awarded a flow of at least eight second feet of water at and above the Duck Creek Dam during low water and twelve second feet as a first and primary right. Obviously in making such a claim, the testimony of defendant witnesses, including their expert Elmer A. Jacob, is to be ignored. The trial court in its findings has gone the limit in determining the amount of land that has been and at the trial was being irrigated by the stockholders of defendant company with the waters from Duck Creek. We have heretofore directed the attention of the court to the testimony of their prin-

cipal witness, Ren Stewart, where he stated that when the Duck Creek Irrigation Company was formed two shares of stock were awarded to each acre of land that was being irrigated from the upper dam and one share of stock to each acre of land that was being irrigated from the lower dam. It will be seen from the Articles of Incorporation that 437 shares were issued by the Duck Creek Irrigation Company. (See plaintiff's Exhibit B). If, as the evidence shows, one-half of such shares went to the land owners who diverted water from the Upper Dam and 2 shares were issued to each acre of land so irrigated, there would be $109\frac{1}{4}$ acres of land irrigated from the upper dam and $218\frac{1}{2}$ acres irrigated with water from the lower dam, or a total of $327\frac{3}{4}$ acres of land irrigated by the stockholders of defendant company with water from the two dams. Notwithstanding such evidence, the trial court found that the stockholders of the defendant company were and had been irrigating 300 acres of land devoted to the raising of agricultural crops and 100 acres of land devoted to the irrigation of other lands. The only possible justification for the finding that the stockholders of the defendant company were and had been irrigating a total of 400 acres was the testimony of Ren Stewart, defendants' principal witness and one of its stockholders, that there was about 3 times as much land irrigated with water diverted at the Duck Creek Dam as that irrigated with water diverted at the Upper Dam.

Thus, if effect is given to the testimony of defendants' expert witness, Jacob, the most that defendant could claim for the 300 acres of land devoted to cultivated crops would be 4.03 second feet. It will be noted that under the decree appealed from, the defendant is awarded more than that amount of water and the plaintiff is awarded only water to irrigate 68 acres while the defendant is awarded water to irrigate 300 acres of cultivated crops. R. 204. Thus the defendant was awarded a water right to all, if indeed not more land than its stockholders claim to have irrigated, while the plaintiff was awarded a water right to only a part of the land that his witnesses testified had been and was being irrigated. We shall again revert to this phase of the case when we come to a discussion of plaintiff's cross assignments of error.

THE TRIAL COURT WAS NOT ONLY JUSTIFIED, BUT EQUITY REQUIRED IT TO PROVIDE FOR A ROTATION OF TURNS IN THE USE OF WATER.

It will be noted that by the Decree entered in this case, the plaintiff was awarded 168/568 and the defendant 400/568 of the waters of Duck Creek up to 28 second feet and during the season from May 1st to December 1st plaintiff was awarded 68/368 and the defendant 300/368 of such waters. Obviously, it would be an utter impossibility to divide the water in that proportion and even if it were the results would be a waste of the water. If there were at a given time, say four second feet of water at the Duck Creek Dam and plaintiff should be

permitted to take 68/368 or less than $1/5$ of the flow, such an award would be a farce. It would require the constant attention of an engineer to make the division, and when the division was made the water to which the plaintiff would be entitled would be wholly valueless for use of the plaintiff. That our courts may make provision for rotation of water rights finds support in the following cases: *Big Cottonwood Tanner Ditch Company v. Shurtliff et al.*, 49 Utah 569, 164 Pac. 856; *Fienstermaker v. Jorgensen*, 53 Utah 325, 178 Pac. 760; *Dameron Valley Reservoir & Canal Company v. Bleak*, 61 Utah 230, 211 Pac. 974. Indeed the defendant company claims that it has followed that procedure.

PLAINTIFF HAS ACQUIRED A RIGHT THROUGH HIS PREDECESSORS IN INTEREST TO THE USE OF THE DITCHES LEADING FROM THE DUCK CREEK DAM TO HIS LANDS.

If, as we have heretofore pointed out, the plaintiff has a right to the use of water diverted at the Duck Creek Dam to irrigate the lands that cannot be irrigated with water diverted at the Stevens Dam, it follows that he has a right to the use of the means of conveying such water to his land.

Counsel for the defendant apparently proceeds on the theory that the Duck Creek Irrigation Company not only owns all of the water that finds its way into Duck Creek, but also owns the ditches which are used to convey the water to the land which throughout the

year has been irrigated with such water. It is contended that the Duck Creek Irrigation Company secured its right to the use of the ditches by reason of the Articles of Incorporation of the Duck Creek Irrigation Company. If that be its source of title, it has no title to the ditches for some distance after the water is diverted from Duck Creek at the Duck Creek Dam. That land was owned by Eliza Stewart when the Articles of Incorporation were signed and she was not one of the incorporators. Tr. 654.

Moreover, A. H. Raleigh, plaintiff's predecessor in title, was awarded a right to course water to irrigate the lands being purchased by the plaintiff across lands which were then owned by Andrew J. Stewart, Jr. and across which the ditches now being used to carry water to the plaintiff's land are located. We again direct the attention of the court to the Findings, Conclusions and Decree made and entered in 1896 in the case of *A. H. Raleigh v. A. J. Stewart, Jr. et al.* The land across which the right was granted was secured by Andrew J. Stewart, Jr. from the United States of America (see tenth page of the instruments certified to by F. M. Alder, Court Reporter). Counsel is in error when he says that the only water involved in that litigation was water that came from the springs north of Payson. In its findings the Court stated "that plaintiff and defendant are each entitled to some water from what is known and described in the pleadings as The Slough or Slough Springs, but is not able to find from the testimony sub-

mitted the amount of water each or any of the parties are entitled to." Moreover, one who has a right to course water across anothers land is not deprived of such right because perchance, the one who has such right may get his water from a different source.

Plaintiff however, need not rely on the award made in 1896. Having used the ditches since at least 1906, plaintiff has an easement by perscription. In Utah and generally, a perscriptive right is acquired by use for a period of 20 years. *North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co.*, 16 Utah 246, 52 Pac. 168, 17 Am. Jur. 968. Nor do we know of authority which holds that one may not acquire a right to an easement to convey high water across anothers land as well as low water. The further observation may be made that under the doctrine announced by this court in the case of *East River Bottom v. Boyce*, 102 Utah 149, 128 Pac. (2d) 277, the execution of the Articles of Incorporation did not convey to the corporation any easement over the lands of the incorporators.

It is further argued that the ditches which lead from the Duck Creek Dam to plaintiff's lands are drain ditches. So far as appears there was no need of constructing ditches to drain the water from Duck Creek. Moreover drain ditches are constructed in the low places of the land to be drained. The ditches leading to and across the land of the plaintiff are on the high parts of the land as the trial court must have observed when viewing the premises.

THE WATERS THAT ARE EMPTIED INTO DUCK CREEK FROM THE BENJAMIN DRAINAGE DISTRICT ARE IN PART WATERS THAT FORMERLY FOUND THEIR WAY INTO THE LANDS BEING PURCHASED BY THE PLAINTIFF.

There is evidence in this case which tends to show that the construction of the Benjamin Drainage system intercepted the underground water that found its way into the land of plaintiff and thus increased the need for more water to irrigate such lands, and that the water so intercepted was emptied into Duck Creek and thereby increasing the flow thereof.

There does not appear to have been a case in Utah where the question has been raised as to whether or not the owner of the land which has thus been deprived of the water which, prior to the construction of the drainage system, found its way to his land has any claim on such water when as here it is turned into a natural water course from which it may be diverted to the land from which it is drained. Colorado has or has had a law which provides that water gathered by drainage improvements belongs to the land owners in proportion to the amount assessed against each. See *Kinney on Irrigation and Water Rights*, 2nd Ed., Vol. 2, page 3266; see also the same volume at page 3265 where meadow lands are protected. Much is said in the case of *Wrathall v. Johnson et al.*, 86 Utah 50, 50 Pac. (2d) 755, which in principle lends support to a similar view, namely that one may not deprive a land owner of his underground water

to his damage. Of course, if one's land is drained and the water so drained is made available to be again applied on the land, no damage would be likely to result. In this case the defendant company is seeking to acquire a right to the water which is emptied into Duck Creek by the Benjamin Drainage District, some of which doubtless served to provide water for the lands of the plaintiff prior to the construction of the drainage system. However, plaintiff need not rely upon such a basis to establish his water right. Under the evidence in this case, the plaintiff has established a right to at least the water awarded to him by the court below and we direct the attention of the court to the foregoing views to show the grave injustice that would be sustained by one similarly situated who could not establish a right by the law applicable to the usual method of appropriation.

So far as appears no one questioned the right of the plaintiff's predecessors to use the ditches leading from the Duck Creek Dam to irrigate the lands of the plaintiff until some of the renters of Mr. Stevens failed to turn the water out of the ditches leading from that dam. Mr. Payne, the secretary of the defendant company, testified as follows:

That at times there is more than enough water for everyone.

“Q. It was the ditches that you wanted to be careful about, that is right, is it?

A. Yes, sir.

- Q. Well now, Mr. Payne, if you were willing to let him (plaintiff) have the use of these ditches for \$2.00 a year; that was a real bargain, wasn't it?
- A. Well, we had so much trouble with those who had been there before flooding the lands, we wanted to control and the regulations, which in the past two years we had had trouble.
- Q. And that was what caused all of this fuss, you had had some trouble with the two renters of Mr. Stevens?
- A. They weren't the only ones that ran water through when the ditches weren't cleaned.
- Q. But that was the cause of this whole controversy, because they had flooded you out down there and you were going to keep people out of this ditch.
- A. No, we didn't tell him we were going to keep him out of the ditch." Tr. 719.

To the same effect is the testimony of Carl E. Lindstrom. Tr. 742. Needless to say one does not lose an easement because he has been guilty of negligence in the use thereof.

The plaintiff has filed a notice of cross appeal and a cost bond. We note that under the new rules a cross appeal is apparently not necessary. See Rule 74 b.

In support of the plaintiff's cross appeal, the following points or Assignments of Error are relied upon:

POINT ONE

The Trial Court erred in failing to retain jurisdiction of the cause for the purpose of disposing of plaintiff's claim for damages on account of the defendant unlawfully depriving plaintiff of the use of the water and ditches to which he was entitled.

POINT TWO

The Trial Court erred in limiting the amount of land to which plaintiff is entitled to irrigate through the Duck Creek Dam to 68 acres.

POINT THREE

The Trial Court erred in awarding to Carl Lindstrom a right to irrigate 22 acres of land with water to be diverted from Duck Creek at the Duck Creek Dam.

POINT FOUR

The Trial Court erred in awarding to Lavon Payne a right to irrigate 56 acres of land with water to be diverted from Duck Creek at the Duck Creek Dam.

POINT FIVE

The Trial Court erred in failing to award costs to the plaintiff.

POINT ONE

It will be seen that by his Complaint the plaintiff sought to recover a judgment against the defendant company because of damages he sustained because of

it refusing and prohibiting the plaintiff from diverting any water through ditches leading from the Duck Creek Dam to the lands which he was purchasing. R. 6 and 10. Upon that issue, the Court found that the plaintiff was unlawfully deprived of the use of water from Duck Creek to be diverted at the Duck Creek Dam, but that no evidence was offered to show the damages, if any, that he had sustained. R. 200.

It is true that no evidence was offered tending to show the damages that were sustained. Obviously any attempt to show damages until it was determined what water the plaintiff was entitled to would have been a useless undertaking. While the record is silent touching the reason for the failure of plaintiff to offer evidence as to damages, it is probably proper to refer to the fact that counsel for the plaintiff mentioned to the court the fact that it was first necessary to have determined the question of the amount, if any, of water that plaintiff was entitled to receive. Without such determination, it would be utterly impossible to establish the amount of damages.

As to the question of damages, either party was entitled to a jury. Suppose in this case a jury had been demanded and impaneled to pass on the matter of damages. Such a jury would have been compelled to wait more than four years before the question of damages could be submitted to them. It is for that reason that

courts are required to dispose of the equitable issues before the legal question can be disposed of. *Park v. Wilkinson et al.*, 21 Utah 279, 60 Pac. 945.

POINT TWO

The evidence shows that the plaintiff is entitled to an award of water to irrigate at least 100 acres of land out of the Duck Creek Dam. We have heretofore directed the attention of the court to the evidence showing that a number of ditches extended from the Duck Creek Dam to various parts of the lands of the plaintiff, and that such ditches were in existence at and before 1906. Also both Mr. Edward R. Stevens and his son, Howard Stevens, testified at length as to the amount of land that was irrigated with water diverted from the Duck Creek Dam. We shall not again go over such testimony, suffice it to observe that the amount of land irrigated from that source was at least 100 acres. Tr. 27, 28, 51, 54, 58, 73, 213, 214.

POINTS THREE AND FOUR

Points three and four involve the same question of law. It will be seen from the findings that the defendant, Lavon Payne, has acquired land from Eliza Stewart and has, when water has been available, used water from the Benjamin Slough to irrigate 56 acres of land owned by him. The court also found that for more than 20

years the defendant, Carl Lindstrom, has beneficially used water from the Benjamin Slough to irrigate 22 acres of land. R. 194.

There is no evidence and no claim is made that either Mr. Payne or Mr. Lindstrom ever filed on any of the waters of Duck Creek or that they or either of them ever acquired a right to the use of the water awarded to them prior to 1903.

Counsel for the defendant corporation is also counsel for both Payne and Lindstrom. He has argued at considerable length that a water right cannot be acquired without a filing in the office of the State Engineer since 1903. It will be interesting for counsel to inform the court why his argument about the law touching the necessity of making a filing in the office of the State Engineer since 1903 in order to establish a water right does not apply to his clients, Payne and Lindstrom.

POINT FIVE

We are mindful that under the law as it existed when this action was brought it gave to the trial court a discretion in an equity case to fix the costs. However, it is well established that when there is a clear abuse of discretion, an appellate court will review and reverse the action of the trial court. In this case no claim was made that the defendant company would sustain any injury whatsoever if plaintiff received some water to irrigate his land. According to the evidence, defendant

company claims to have water to sell. There was also capacity in the ditches leading from the Duck Creek Dam which plaintiff could use by the payment of \$2.00.

We submit that the judgment should be amended to the effect that plaintiff be awarded the right to course water through the ditches leading from the Duck Creek Dam; that the court below should be directed to permit the cause to be tried as to damages, if any, that plaintiff has sustained; that the award of a water right to Payne and Lindstrom should be reversed and their claim of a water right be denied and that plaintiff be awarded a right to irrigate 100 acres of land with water diverted at the Duck Creek Dam and his costs incurred in the trial of this cause in the court below and his costs in this appeal.

Respectfully submitted,

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Angus Bishop.*

CHRISTENSON & CHRISTENSON,

Attorneys for Appellant.